Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-477

WEST SIDE WOMEN'S SERVICES, INC., and RICHARD J. DERMAN, M.D., INC.,

Petitioners,

v.

CITY OF CLEVELAND, OHIO, CITY COUNCIL OF CLEVELAND, OHIO, LOUIS CIVITTOLD, Commissioner of Assessments and Licenses, RONALD SWANGER, M.D., Director of Public Health & Welfare, DENNIS KUCINICH, Mayor, ROBERT E. GETZ, City Councilman, RALPH J. PERK, THOMAS M. KEANE, individually and in their official capacities, their agents, successors in interest, and those acting in concert with them,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No.

WEST SIDE WOMEN'S SERVICES, INC., and RICHARD J. DERMAN, M.D., INC.,

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v.

CITY OF CLEVELAND, OHIO, CITY COUNCIL OF CLEVELAND, OHIO, LOUIS CIVITTOLD, Commissioner of Assessments and Licenses, RONALD SWANGER, M.D., Director of Public Health & Welfare, DENNIS KUCINICH, Mayor, ROBERT E. GETZ, City Councilman, RALPH J. PERK, THOMAS M. KEANE, individually and in their official capacities, their agents, successors in interest, and those acting in concert with them,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

West Side Women's Services, Inc., and Richard J. Derman, M.D., respectfully petition this Court for a writ of certiorari to review the August 15, 1978, judgment of the court of appeals which affirmed the denial by the district court of a preliminary injunction sought by petitioners to

enable them to open a first trimester abortion service in a locality where any other medical service may be located, but where abortion alone is excluded by the recent ordinance in question.

OPINIONS BELOW

The August 15, 1978, order and opinion of the United States Court of Appeals for the Sixth Circuit has not yet been reported. A copy is included in the Appendix, *infra*, at 1a-2a.

The March 1, 1978, opinion of the United States District Court for the Northern District of Ohio, Frank J. Battisti, Chief Judge, has been officially reported as *West Side Women's Services, Inc. v. City of Cleveland*, 450 F. Supp. 796 (N.D. Ohio 1978). A copy is set out in the Appendix, *infra*, at 3a-7a.

JURISDICTION

(i) The United States Court of Appeals issued and filed its order on August 15, 1978. The order constitutes judgment of that court. (App. 1a).

(ii) Petitioners sought no rehearing, and made no requests for additional time to file this petition.

(iii) Petitioners invoke the certiorari jurisdiction of this Court under 28 U.S.C. § 1254 (1). Cases supporting jurisdiction include: *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967); *Roe v. Wade*, 410 U.S. 113 (1973); *Moore v. City of Cleveland*, 431 U.S. 494 (1977).

QUESTIONS PRESENTED

I.

Whether Section 231.09 of the Cleveland ordinances violates the due process clause of the Fourteenth Amend-

ment by excluding any abortion service from "local retail business districts" in which all other "dental, medical or other established recognized professions" may be located, and where all other forms of minor, outpatient surgery except abortions may be performed?

II.

Whether the exclusion of abortion services from areas zoned to allow all other medical and professional services violates the equal protection clause of the Fourteenth Amendment?

III.

Whether the District Court abused its discretion by denying preliminary injunctive relief when irreparable injury and a high probability of success on the merits were present?

CITY ORDINANCE AT ISSUE

"WHEREAS, this ordinance constitutes an emergency measure providing for the usual daily operation of a municipal department and for the immediate preservation of the public health, safety and welfare; now, therefore,

BE IT ORDAINED BY THE COUNCIL OF THE CITY OF CLEVELAND:

Section 1. That the Codified Ordinances of the City of Cleveland, Ohio 1976, be and the same hereby are supplemented by enacting new Section 231.09 thereof, to read as follows:

Section 231.09 *Prohibition Against Issuing Abortion Service License*[1] *in Local Retail Business District.*

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[1] In this action plaintiffs did not contest the remainder of Chapter 231 which generally regulates abortion services.

Notwithstanding any other provisions of the Codified Ordinances of the City of Cleveland, no license, required under the provisions of Section 231.06, of the Codified Ordinances of the City of Cleveland, shall be issued for an abortion service to be located in a local retail business district as set forth in Section 343.01 of the Codified Ordinances of the City of Cleveland, and *no abortion service shall operate in a local retail business district.*

Section 2. That this ordinance is hereby declared to be an *emergency measure* and, provided it receives the affirmative vote of two-thirds of all elected members of Council it shall take effect and be in force immediately upon its passage and approval by the Mayor; otherwise it shall take effect and be in force from and after the earliest period allowed by law. July 18, 1977." (Emphasis added).

RELATED ORDINANCE

"Section 343.01 *Local Retail Business District.*[2]

(b) *Permitted Buildings and Uses.*

The following buildings and uses are permitted in a Local Retail Business District; no buildings or premises shall hereafter be erected, altered, used, arranged or designed to be used, in whole or in part for other than one or more of the following specified uses, and there shall be no display of goods in front of a setback building line.

(1) Except as otherwise provided in this Zoning Code, all uses permitted and as regulated in the least restricted Residence District adjacent to any part of such Local Retail Business District.

* * *

(3) Business offices: real estate, insurance and other similar offices, and the offices of the architectural, clerical, engineering, *legal, dental, medical or other established recognized professions* but excluding morticians, undertakers and funeral directors, in which only such personnel are employed as are customarily required for the practice of such business or professions and not exceeding a total of five persons at any one time.

* * *

(6) Other main uses: any other neighborhood stores, shop or service similar to the uses listed in this subsection (b) in type of goods or services sold, in business hours, in the number of persons or cars to be attracted to the premises and in effect upon the adjoining Residence Districts.

(7) Accessory uses: only to the extent necessary and normally accessory to the limited types of neighborhood service use permitted under this subsection (b). (Ord. No. 2137-66. Passed May 22, 1967. Effective May 23, 1967)."

[2]The entirety of Section 343.01 appears in the Record.

STATEMENT OF THE CASE[3]

Plaintiff Dr. Richard Derman is a duly licensed physician who specializes in obstetrics and gynecology. He is certified by the American Board of Obstetrics and Gynecology, and has had substantial experience in the family planning field. This includes the performance of first trimester abortion in the low cost outpatient setting.

West Side Women's Services, Inc. [hereinafter "WSWS"] is an Ohio corporation, set up to provide the administrative and non-medical aspects of a family planning practice.

Dr. Derman and WSWS together planned to establish a first trimester abortion service on the west side of

[3]The complaint and exhibits are part of the Record.

Cleveland in the fall of 1977. There was no similar facility in west Cleveland at the time.

On or about May 11, 1977, WSWS signed a ten year lease on a certain professional office space "for use as an abortion clinic . . . in an area zoned for 'local retail business.'" *WSWS v. City of Cleveland, supra*, 450 F. Supp. at 797. (App. 5a).

WSWS proceeded to make improvements, obtain supplies, purchase equipment, and hire personnel, all in anticipation of an opening in late September or thereafter. As admitted by the district court,

> "[p]rofessional medical offices are permitted in these districts by the City zoning ordinances." *Id.* at 797. (App. 5a).

Shortly after certain building permits were issued on the WSWS space, defendants Getz and Keane, city councilmen, introduced an "emergency" ordinance, Section 231.09, to ban abortion services from areas zoned "local retail business district." The ordinance passed the same night, became effective July 18,[4] 1977, and remains in effect.

Dr. Derman and WSWS subsequently brought this action to invalidate the ordinance as an unconstitutional effort to restrict first trimester abortion services. They claimed Fourteenth Amendment rights of privacy, liber-

[4]The date appearing in the opinions below, *June* 18, 1977, is a typographical or otherwise inadvertent error.

[5]Delay between passage and filing is not relevant here. However, possible explanations might include the exploration of other options and locations, plus serious consideration before undertaking this litigation. An earlier abortion clinic case in the same district was held for over seven months. See *Mahoning Women's Center v. Hunter* 444 F. Supp. 12 (N.D. Ohio 1977).

ty, and property. They based federal jurisdiction on 28 U.S.C. §§1331, 1343, and sought relief under 42 U.S.C. §1983 et seq.

On March 1, 1978, almost eight months after passage of the ordinance, the district court issued a memorandum opinion and order. *WSWS v. City of Cleveland,* 450 F. Supp. 796 (N.D. Ohio 1978) (App.4a). Recognizing that the ". . . briefs raise no question of fact, only a question of law. . . ." 450 F. Supp. at 797 (App. 5a), the district court considered solely whether there was "probability of success on the merits," *Id.* at 798 (App. 7a), in the view of that Court.

Dr. Derman and WSWS relied heavily upon *Roe v. Wade;* 410 U.S. 113 (1973), *Sendak v. Arnold,* 429 U.S. 968 (1976) (per curiam), and *Moore v. City of East Cleveland,* 431 U.S. 494 (1977). Plaintiffs pointed out that the ordinance restricted exercise of the *Roe v. Wade* rights by inexplicably limiting the areas where an abortion service could be established, and preventing existing medical services in the area from continuing or adding abortion services in their practice.

At no time did plaintiffs seek any subsidy or medical assistance from the City of Cleveland. Plaintiffs distinguished *Maher v. Roe,* 432 U.S. 464 (1977), in the words of the *Maher* majority, as involving

> "a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity. . . ." 432 U.S. at 475.

Plaintiffs noted also the pronouncement that *Maher* "signals no retreat from *Roe* or the cases applying it." *Id.* at 475.

Nonetheless, the district court found in this zoning and land use ordinance "'. . . a value judgement favoring

childbirth over abortion. . . .'" 450 F. Supp. at 798 (App. 6a). This value judgment, passed as an emergency zoning ordinance, enabled the district court to discount any probability of success on the merits, and to deny injunctive relief. The district court also refused to find any impact on a fundamental right.

Plaintiffs appealed to the Sixth Circuit. There a panel declined to address "the merits of the broad and sensitive constitutional issues involved . . ." and found "an insufficient showing that the [trial] court abused its discretion. . . ." (App. 2a). The court affirmed, citing no cases.

The district court opinion rests upon a manifestly incorrect application of *Maher v. Roe* that subordinates *Roe v. Wade*. It urgently requires appellate correction due to the high volume of litigation in this field and the fundamental importance of the rights in question. Accordingly, plaintiffs have brought the case here.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION BELOW IS IN SHARP CONFLICT WITH *ROE v. WADE, SENDAK v. ARNOLD,* AND *MOORE v. CITY OF EAST CLEVELAND,* BECAUSE IT UPHOLDS THE EXCLUSION OF FIRST TRIMESTER ABORTION SERVICES FROM AREAS ZONED TO ALLOW ALL OTHER MEDICAL & PROFESSIONAL PRACTICES.

Roe V. Wade, supra, held that a state may not, in the first trimester of pregnancy, interfere with "the abortion decision and its effectuation." 410 U.S. at 164. These are matters of fundamental privacy between the physician and patient. *Doe v. Bolton,* 410 U.S. 179 (1973), applied the principles of *Roe* to restrictions on the type of facility and procedures for abtaining an abortion at various

stages of pregnancy. Subsequent decisions have clarified issues of standing,[6] third party consent,[7] clinic regulation,[8] and government subsidy.[9] At least one case, *Moore v. City of East Cleveland,* 431 U.S. 494 (1977), has relied in part upon *Roe v. Wade* to invalidate a zoning restriction with adverse impact upon fundamental privacy and family values.

The decision below is completely at odds with the holdings and direction of the cases from *Roe v. Wade* through *Moore v. City of East Cleveland.* It stands, for the present, as a precedent that will be invoked in favor of any and every town council effort to circumvent *Roe v. Wade.*

In four respects the district court committed fundamental error.

First, the court found no impact of the ordinance upon any fundamental constitutional rights. 450 F. at 798. (App. 6a). Other abortion services were found to be available elsewhere in the city. *Id.* The possibility of an alternative, however, does not excuse the passage of a discriminatory and indefensible ordinance. Otherwise, Mrs. Moore in *Moore v. City of East Cleveland, supra,* could have been required to move her family away and to look until she found another home zoned another way.

This petition presents a clearer case than *Moore.*[10] The single family dwelling ordinance was at least even-handed

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[6] *Singleton v. Wulff,* 428 U.S. 106 (1976).

[7] *Planned Parenthood v. Danforth,* 428 U.S. 52 (1976).

[8] *Sendak v. Arnold,* 429 U.S. 968 (1976) (per curiam), *aff'g* 416 F. Supp. 22 (S.D. Ind.) (three-judge court).

[9] *Maher v. Roe,* 432 U.S. 464 (1977).

[10] The district court chose not to distinguish or even discuss the *Moore* case.

on its face. The ordinance here is abortion-specific. Indeed, this is the type of case envisioned by the dissenting opinion of Justice Stewart in *Moore* as involving rights "constitutionally protected against state interference." 431 U.S. at 536. The present case is more akin to *Buchanan v. Warley*, 245 U.S. 60 (1917), than to *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974). The *Belle Terre* majority, however, expressly distinguished the type of case involving "rights of privacy," and cited *Griswold v. Connecticut*, 381 U.S. 479 (1965), and *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

None of these distinctions were dealt with by the district court.

The second fundamental error of the district court was its improper analysis of the City's interest. An abortion-specific zoning ordinance is an unusual place to codify "'a value judgment favoring childbirth over abortion.'" 450 F. Supp. at 798 (App. 6a). There is no evidence of an emergency from decreasing population in Cleveland. As Justice Powell stated in *Moore*, one "need not labor the point. Section [231.09] has but a tenuous relationship to alleviation of the conditions mentioned by the city." 431 U.S. at 500.

A third grave error below was the elevation of *Maher v. Roe*, 432 U.S. 464 (1977), to a standard for substantive restrictions on first trimester abortion services. *Maher* expressly "signals no retreat from *Roe* or the cases applying it." *Id.* at 475. The *Maher* majority carefully distinguished the *Roe* and *Doe* line of cases as involving

> "a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity." 432 U.S. at 475.

That crucial distinction was avoided by the district court in favor of dictum taken out of context.

Finally, the district court erred in its treatment of the considerable line of cases that bar overregulation of first trimester abortion practice. E.g., *Sendak v. Arnold*, 429 U.S. 968 (1976), *aff'g mem.* 416 F. Supp. 22 (S.D. Ind.) (three-judge court). Section 231.09 itself is located in a chapter of ordinances that regulate first trimester abortions. It is not even in the zoning ordinances. Section 231.09 regulates abortion services in two respects: WSWS cannot locate in certain areas where any other medical office could locate, and physicians already in such areas may not include abortion "as a primary service or as an integral part of a broader practice. . . ." Cleveland Ordinances, C. 231, *Abortion*, Section 231.01 (d).

Such a restriction on location cannot be justified on any rational basis of health, welfare, patient needs, or medical practice. The sole apparent objective is the restriction of available abortion services. That is not a legitimate objective under the controlling case law.

In sum, the court of appeals and district court made fundamental errors of law which should be corrected by this Court.

II.

THE PETITION RAISES IMPORTANT, RECURRING QUESTIONS ON THE RELATIONSHIP BETWEEN *ROE v. WADE* AND *MAHER v. ROE* IN THE CONTEXT OF NUMEROUS NEW CITY ORDINANCES THROUGHOUT THE UNITED STATES THAT ATTEMPT TO REGULATE, ZONE, AND OTHERWISE RESTRICT THE FUNCTIONING OF ABORTION SERVICES.

The district court interpretation of *Maher v. Roe* opens the way for numerous other efforts to undermine *Roe v. Wade* and *Doe v. Bolton*. If a city may promote popula-

tion growth through discriminatory zoning and medical regulation of first trimester abortion, then only the imagination can set limits on restrictions that will follow.

Considerable litigation has already occurred in regard to unreasonable zoning restrictions on abortion services.[11] Zoning-type restrictions on abortion had little success prior to the present case. For example the City of St. Paul was enjoined by the Eighth Circuit from a six month moratorium on abortion facilities in *Planned Parenthood v. Citizens for Community Action*, 558 F.2d 861 (8th Cir. 1977).

The lower court decision, however, offers renewed encouragement to discriminatory and arbitrary use of the zoning power. The reasoning below is directly at odds with that in the other abortion-zoning case, and presents an arguable conflict of circuits on the merits as well as the criteria for injunctive relief.

Similarly, much litigation has occurred over city regulations that burden the abortion decision and its effectuation. Detailed clinic regulations have been passed and struck down in many jurisdictions.[12] This Court in *Sendak v. Arnold*, 429 U.S. 968 (1976) (per curiam), summarily affirmed one such decision. 416 F. Supp. 22 (S.D. Ind.) (three-judge court).

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[11] E.g., *Fox Hill Surgery Clinic, Inc. v. City of Overland Park*, ___ F. Supp. ___ (D. Kan. July 11, 1977) (Civ. No. 77-4120); *Framingham Clinic v. Board of Selectmen*, 367 N.E. 2d 606 (Mass. 1977).

[12] E.g., *Friendship Medical Center, Ltd. v. Chicago Bd. of Health*, 505 F.2d 1141 (7th Cir. 1974), *cert. denied*, 420 U.S. 997 (1975); *Word v. Poelker*, 495 F.2d 1349 (8th Cir. 1974); *Mahoning Women's Medical Center v. Hunter*, 44 F. Supp. 12 (N.D. Ohio 1977); *Mobile Women's Medical Clinic v. Bd. of Commissioners*, 426 F. Supp. 331 (S.D. Ala. 1977).

The lower court decision and its view of *Maher v. Roe* offer new arguments for a revival of regulations such as those involved in *Sendak*. That probability should be prevented by prompt review and reversal of the decision below in this Court.

III.

THIS COURT SHOULD REVIEW THE JUDGMENT BELOW BECAUSE THE DENIAL OF INJUNCTIVE RELIEF IS AN ABUSE OF DISCRETION THAT JEOPARDIZES THE EFFECTIVE EXERCISE OF FUNDAMENTAL PRIVACY RIGHTS.

The decision below is in conflict with *Doran v. Salem Inn*, Inc., 422 U.S. 922 (1975), and with the interpretation of *Doran* by the Eighth Circuit in *Planned Parenthood v. Citizens for Community Action*, 558 F.2d 861 (8th Cir. 1977). Plaintiffs presented a case for preliminary injunction below far stronger than that which warranted such relief in *Dorean v. Salem Inn*, 422 U.S. 922, 932 (1974). WSWS and Dr. Derman alleged injury not only to patients who would be turned away, but also of the same nature as noted in *Doran, supra*,

> "that absent preliminary relief they would suffer a substantial loss of business and perhaps even bankruptcy." *Id.* at 932.

The equipping of a medical office and maintenance of a ten year lease are clearly an economic burden that becomes more serious each day. This Court has granted or upheld temporary injunctive relief pending appeal on many occasions to protect fundamental privacy rights and property rights. For example, the Court in *Planned Parenthood v. Danforth*, 420 U.S. 918 (1975) (per curiam), granted a stay pending appeal of the three-judge court decision in 392 F. Supp. 1362 (E.D. Mo. 1975).

Similarly, the Court in *Nichol v. Kennan*, 404 U.S. 1055 (1972) (per curiam), affirmed a lower court granting of temporary injunctive relief against a Wisconsin abortion law. 326 F. Supp. 613 (W.D. Wis. 1971).

The present case is made less complicated by the finding below that "[t]he pleadings and briefs raise no question of fact, only a question of law." 450 F. Supp. 797 (App. 5a). The district court spoke in terms of upholding the ordinance as a matter of law. Accordingly, this Court may reverse the judgment below as an incorrect application of legal principles. The high probability of success on the merits, plus the injury already incurred, warrant reversal with directions to enter injunctive relief.

CONCLUSIONS

For the reasons set out, the Court should grant this Petition and set the case down for plenary consideration with briefs on the merits and oral argument.

Respectfully submitted,

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September 15, 1978

APPENDIX

[Filed August 15, 1978]

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

78-3160 ORDER

WEST SIDE WOMEN'S SERVICES, INC., et al.,

Plaintiffs-Appellants,

v.

CITY OF CLEVELAND, et al.,

Defendants-Appellees.

Before: EDWARDS, ENGEL and MERRITT, Circuit Judges

This is an interlocutory appeal from an order of the district court denying plaintiffs' application for the issuance of a preliminary injunction prior to any hearing on the merits. Plaintiffs sought to forbid the enforcement by the City of Cleveland of an ordinance passed by the Cleveland City Council on June 18, 1977, which prohibits the issuance of abortion service licenses in local retail districts of the city. Cleveland, Oh., Codified Ordinances § 231.09.

In denying interlocutory relief, the district court found that plaintiffs had failed to satisfy the trial court of the probability of their success on the merits.

The range of discretion of the district judge in granting or denying preliminary injunctive relief in advance of any ultimate hearing on the merits is necessarily broad, and

this court is particularly reluctant to disturb that judgment in the absence of a clear showing of abuse. While on the limited facts before us we are unable to reach even a tentative conclusion as to the ultimate merits of the case, and express no opinion thereon, we cannot find an abuse of discretion in the denial of preliminary injunctive relief, particularly since an injunction would run against the operation of a municipal ordinance with the attendant issues of comity and federalism at stake.

While each party to the appeal has urged this court to make a final adjudication on the merits of the broad and sensitive constitutional issues involved, we decline to do so, concluding that we should reserve judgment until after any final judgment has been entered upon a completed record in the district court. Accordingly,

IT IS ORDERED that the judgment of the district court is affirmed on the ground that there has been an insufficient showing that the court abused its discretion in denying preliminary injunctive relief, but expressly without making any determination on the merits of the constitutional issues involved.

IT IS FURTHER ORDERED that upon remand, the district court shall expedite any final hearing on the merits of the case to the extent consistent with its obligation to hear any matters enjoying a higher priority.

Entered by Order of the Court
John P. Hehman, Clerk

By_____
Grace Keller, Chief Deputy

WEST SIDE WOMEN'S SERVICES INC., et al., Plaintiffs,

v.

CITY OF CLEVELAND, et al., Defendants.

No. C77-1112.

United States District Court, N.D. Ohio, E.D.

March 1, 1978.

* * *

MEMORANDUM OPINION AND ORDER

BATTISTI, Chief Judge.

Plaintiffs, a physician and a clinic corporation, have rented facilities for use as an abortion clinic on the west side of Cleveland in an area zoned for "local retail business." Professional medical offices are permitted in these districts by the City zoning ordinances. On June 18, 1977, the City Council passed, as an emergency measure, section 231.09 of the Codified Ordinances of the City of Cleveland, entitled "Prohibition Against Issuing Abortion Service License in Local Retail District." Section 231.09 is a part of Chapter 231 of the Codified Ordinances, which regulates abortion services and sets licensing standards.

At the time section 231.09 was passed and signed into law by the Mayor, plaintiffs had obtained a lease on the premises and had secured a zoning permit for the desired use. They had not requested a license to open an abortion clinic as required by Chapter 231.

Plaintiffs allege that the actions of defendants contravene plaintiffs' rights under the due process and equal protection clauses of the fourteenth amendment by preventing plaintiff, Dr. Derman, from treating patients and by causing economic damage to plaintiff clinic, West Side Women's Services, in contravention of the Supreme Court's decisions in *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), *Sendak v. Arnold*, 429 U.S. 968, 97 S.Ct. 476, 50 L.Ed.2d 579 (1976), and *Moore v. City of East Cleveland*, 431 U.S. 494, 97 S.Ct. 1932, 52 L.Ed.2d 531 (1977). In addition, plaintiffs raise the privacy rights of prospective patients who they allege will be emotionally and financially damaged by being denied medical care or being required to seek alternatives to abortion. Such harm, plaintiffs allege, will be irreparable, entitling them to preliminary injunctive relief. *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 95 S.Ct. 2561, 45 L.Ed.2d 648 (1974). The federal questions thus raised give this Court jurisdiction under 28 U.S.C. §1331, 1343.

Defendants argue that the ordinance in question does not interfere with a fundamental constitutional right, and thus must be judged by a rational basis test. Using such a test, defendants allege that the ordinance is a proper exercise of police power by the city. According to defendants, the economic harm claimed by plaintiffs is not irreparable, and does not entitle plaintiffs to preliminary injunctive relief.

The pleadings and briefs raise no question of fact, only a question of law.

Defendants do not dispute that at least Dr. Derman has standing to raise the privacy rights of his patients. *Singleton v. Wulff*, 428 U.S. 106, 96 S.Ct. 2868, 49 L.Ed.2d 826 (1976). If defendant's actions interfere with a fundamental constitutional right of either plaintiffs or their

patients, those actions must be taken in furtherance of a compelling state interest. If there is no such infringement, however, defendants' actions must be judged on the basis of their rational relationship to a legitimate state interest.

In its recent decisions on the abortion issue, the Supreme Court has isolated two fundamental rights derived from the right to privacy which are constitutionally protected from state interference. In the first trimester of pregnancy, the state cannot interfere with either the abortion "decision" or with the "physician-patient relationship" unless there is a "compelling" countervailing state interest. *Singleton, supra*, 428 U.S. at 81, 96 S.Ct. 2868. Not all distinction between abortions and other medical procedures is forbidden. *Id.* at 149, 96 S.Ct. 2868.

In *Maher v. Roe*, 432 U.S. 464, 97 S.Ct. 2376, 53 L.Ed.2d 484 (1977), the Supreme Court recognized a legitimate state interest in promoting live births over abortions as an alternative method of dealing with pregnancy.

> *Roe v. Wade* . . . did not declare an unqualified "constitutional right to an abortion" . . . Rather, the right protects the woman from *unduly burdensome interference* with her freedom to decide whether to terminate her pregnancy. It implies no limitation on the authority of a State to make a value judgment favoring childbirth over abortion . . . .

Id., 432 U.S. at 473, 97 S.Ct. at 2382 (emphasis added). Defendants' decision to permit professional medical offices to operate in local retail business districts, but to deny abortion clinics that right, appears to be consonant with such a "value judgment." Therefore, the ordinance

can be said to bear a rational relationship to a legitimate state interest. *Cf., Planned Parenthood v. Danforth,* 428 U.S. 52, 96 S.Ct. 2831, 49 L.Ed.2d 788 (1976).

The decision to ban abortion clinics from certain areas of the City does not "unduly burden" either the abortion decision or the physician-patient relationship. Women who wish to obtain abortions have access to services in other areas of the City. That such services exist is shown by the list included in the affidavit of Joyce E. Redon (defendants' Exhibit "B"). This is a different case from those relied upon by plaintiffs in which abortion clinics were effectively banned from an entire political subdivision. *See, e.g., Planned Parenthood of Minnesota, Inc. v. Citizens for Community Action,* 558 F.2d 861 (8th Cir., 1977) (city passed moratorium on building of abortion clinic which would have been a unique facility in city); *Framingham Clinic, Inc. v. Board of Selectmen of Southborough,* 367 N.E.2d 606 (Mass.Sup.Jud. Ct.1977) (abortion clinics declared prohibited use for entire town); *Kennan v. Nichol,* 326 F.Supp. 613 (W.D. Wis. 1971), *aff'd* 404 U.S. 1055, 92 S.Ct. 735, 30 L.Ed.-2d 743 (1972) (statute required all abortions to be performed in "licensed maternity hospital").

Nor does the portion of the abortion ordinance in question, section 231.09, attempt to regulate the method of providing first trimester abortions or the type of facilities which may be used, as did the Indiana statute held unconstitutional in *Sendak v. Arnold,* 429 U.S. 968, 97 S.Ct. 476, 50 L.Ed.2d 579 (1976), *affirm'g* 416 F.Supp. 22 (S.D.Ind.), and the Youngstown statute in *Mahoning Women's Center v. Hunter,* 444 F.Supp. 12 (N.D.Ohio, 1977).

Neither do plaintiffs have a fundamental right to perform abortions. Assuming plaintiffs do have a fundamental right to "property," *i.e.,* running a business, pursuant to the fourteenth amendment, that right is no more abridged by this ordinance than by any zoning law. Plaintiffs do not seriously question defendants' authority to restrict certain uses to appropriate areas of the City. Plaintiffs are not prevented from treating their patients—they are only restricted as to the location of their facilities.

Thus, plaintiffs fail to meet the primary requirement for granting a preliminary injunction—probability of success on the merits. *Virginia Petroleum Jobbers Ass'n v. FPC,* 104 U.S.App.D.C. 106, 259 F.2d 921 (1958). This failure makes it unnecessary to consider the other issues raised by plaintiffs' Motion.

IT IS THEREFORE ORDERED that plaintiffs' Motion for Preliminary Injunction be denied.

Supreme Court, U. S.
FILED
OCT 19 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

NO. 78-477

WEST SIDE WOMEN'S SERVICES, INC.
AND
RICHARD J. DERMAN, M.D., INC.
Petitioners,

VS.

CITY OF CLEVELAND, OHIO
CITY COUNCIL OF CLEVELAND, OHIO
LOUIS CIVITTOLO, DENNIS KUCINICH
ROBERT E. GETZ, RALPH J. PERK
AND
THOMAS M. KEANE
Respondents

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1978

No. 78-477

WEST SIDE WOMEN'S SERVICES, INC.
and
RICHARD J. DERMAN, M.D., INC.

Petitioners

vs.

CITY OF CLEVELAND, OHIO
CITY COUNCIL OF CLEVELAND, OHIO
LOUIS CIVITTOLO, DENNIS KUCINICH
ROBERT E. GETZ, RALPH J. PERK
and
THOMAS M. KEANE

Respondents

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

STATEMENT OF THE CASE

On October 20, 1977, Petitioners West Side Women's Services, Inc. and Richard J. Derman, M.D., Inc. filed suit against the City of Cleveland, several of its officers and councilmen. In the Complaint, West Side Women's Services, Inc.

alleged that it would operate that part of an abortion service providing non-medical procedures and that Dr. Derman would constitute that part of the abortion service performing medical procedures, said abortion clinic to be situated at an address located within an area zoned as a "local retail business district." The Complaint further alleged that Section 231.09 of the Codified Ordinances of Cleveland, Ohio, 1976, violated 42 U.S.C. §1983 and the Fourteenth Amendment to the United States Constitution because it prevented the operation of abortion services in local retail districts. The Petitioners requested preliminary and permanent injunctive relief, a declaratory judgment, damages and costs. They filed a Motion for Preliminary Injunction concurrently with the Complaint.

On February 23, 1978, the district court held an evidentiary hearing on the Motion for Preliminary Injunction. At that hearing, Petitioners strenuously argued that the compelling state interest test should be applied to the contested ordinance while Respondents urged that the rational basis test was the appropriate standard because the challenged ordinance does not interfere with the abortion decision.

On March 1, 1978, the district court issued a Memorandum Opinion and Order denying Petitioners' Motion for Preliminary Injunction. The court held that the movants had failed to demonstrate a probability of success on the merits. The court consequently found it unnecessary to consider the remaining conditions precedent to the granting of a pre-

liminary injunction,[1] although extensive testimony had been offered by Ms. Patricia Steenblock, a representative of West Side Women's Services, Inc., in an effort to establish the element of irreparable harm.[2]

On March 28, 1978, Dr. Derman and West Side Women's Services filed a Notice of Appeal, Motion for an Expedited Hearing and Appellants' Brief. They urged the United States Court of Appeals for the Sixth Circuit to apply the compelling state interest test to the challenged ordinance. The Court scheduled an expedited hearing and oral arguments were presented on June 22, 1978.

On August 15, 1978, the court of appeals affirmed the judgment of the district court stating that "there has been an insufficient showing that the trial court abused its discretion in denying preliminary injunctive relief" and indicating that it could not render

---

1 Memorandum Opinion and Order, West Side Women's Services, Inc., et al. vs. City of Cleveland, et al., No. C77-1112, slip op. at 5 (N.D. Ohio, March 1, 1978).

2 Therefore, should this Court find that the district court abused its discretion in concluding that West Side Women's Services was not substantially likely to succeed on the merits, it would be necessary to remand the case for consideration of the remaining three elements of preliminary injunctive relief.

even a tentative judgment on the merits of the case upon the limited facts before it. The appeals court ordered the district court to expedite the hearing on the merits.

Rather than pursue the expedited hearing in the district court, Dr. Derman and West Side Women's Services have chosen to petition this Court for a writ of certiorari to review the extremely narrow and limited decision of the court of appeals.

CITY ORDINANCES INVOLVED

The relevant ordinance sections are Section 231.09 and Section 343.01 which is the section of the Zoning Code defining "local retail business districts."

Section 231.09 reads as follows:

> 231.09 Prohibition Against Issuing Abortion Service License In Local Retail District
>
> Notwithstanding any other provision of the Codified Ordinances of the City of Cleveland, no license, required under the provisions of Section 231.06 of the Codified Ordinances of the City of Cleveland, shall be issued for an abortion service to be located in a local retail business district as set forth in Section 343.01 of the Codified Ordinances of the City of Cleveland, and no abortion service shall operate in a local retail business district.

Section 343.01 provides in pertinent part as follows:

> 343.01 Local Retail Business District.
>
> (a) Defined.
>
> As used in this Zoning Code, "Local Retail District" means a business district adjacent to or surrounded on at least three sides by Residence Districts in which such uses are permitted as are normally required for the daily local retail business needs of the residents of the locality only.
>
> (b) Permitted Buildings and Uses.
>
> The following buildings and uses are permitted in a Local Retail Business District; no buildings or premises shall hereafter be erected, altered, used, arranged or designed to be used, in whole or in part for other than one or more of the following specified uses, and there shall be no display of goods in front of a setback building line.
>
> * * *
>
> (3) Business offices: real estate, insurance and other similar offices, and the offices of the architectural, clerical, engineering, legal, dental, medical or other established recognized professions but excluding morticians, undertakers

> and funeral directors, in which only such personnel are employed as are customarily required for the practice of such business or profession and not exceeding a total of five persons at any one time.
>
> (Emphasis Added)

* * *

The plain language of Section 343.01 of the Codified Ordinances of Cleveland, Ohio, 1976, demonstrates that Petitioners have misstated the first and second questions presented to this Court. They assert that all other dental, medical or other professional offices may be situated in local retail buiness districts and that all other forms of minor outpatient surgery except abortions may be performed; however, the words of the ordinance impose limitations on the nature of medical offices or facilities which may operate in a local retail business district.

By definition, a "local retail business district" is an area in which there are allowed only "such uses ... as are normally required for the daily local retail business needs of the residents of the locality only." Section 343.01(a) of the Codified Ordinances of Cleveland, Ohio, 1976. Additionally, although medical offices are listed as a permitted use, not all medical offices are permitted, but only those "in which only such personnel are employed as are customarily required for the practice of such business or profession and not exceeding a total of five persons at any one time." Section 343.01(b)(3), of the Codified Ordinances of Cleveland, Ohio 1976. Therefore, while it is correct to say that some medical

offices may operate in local retail districts, it is certainly not correct to say that "any other medical office" may operate in such area. Thus, the language of Section 343.01 eliminates Petitioners' equal protection and substantive due process challenges.

REASONS FOR DENYING THE WRIT

I

THE WRIT SHOULD BE DENIED BECAUSE THE MOTION FOR PRELIMINARY INJUNCTION SOUGHT TO BE REVIEWED WAS ADDRESSED TO THE TRIAL COURT'S DISCRETION AND THE INCOMPLETE RECORD DOES NOT SUPPORT A FINDING THAT THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING THE MOTION.

A motion for a preliminary injunction is always addressed to the trial court's discretion. Yakus vs. United States, 321 U.S. 414 (1944). "Injunction is an equitable remedy which should not be lightly indulged in, but used sparingly and only in a clear and plain case." Plain Dealer Publishing Co. vs. Cleveland Typographical Union No. 53, 520 F. 2d 1220, 1230 (6th Cir. 1976), cert. denied, 428 U.S. 909 (1976). This Court has characterized the standard to be applied in determining whether a plaintiff is entitled to a preliminary injunction as "stringent." Doran vs. Salem Inn, Inc., 422 U.S. 922, 931 (1975).

Because a motion for preliminary injunction is addressed to the court's discretion, the standard for review of the denial of said motion is whether the court abused its discretion.

Brown vs. Chote, 411 U.S. 452, 457 (1973); Keyes vs. School District No. 1, Denver, Colorado, 396 U.S. 1215, 1216 (1969). In McBee vs. Bomar, 296 F.2d 236, 237 (6th Cir. 1961), the court stated that "... when judicial action is taken in a discretionary matter, such action cannot be set aside by a reviewing court unless it has a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached..." The determination that the trial court abused its discretion depends on a finding that the lower court has made a serious error and not merely that the reviewing court disagrees. El Dorado and W. Ry. Co. vs. Chicago R.I. and P. Ry. Co., 5 F. 2d 777 (8th Cir. 1925).

In the instant case, with due regard for the above principles, the United States Court of Appeals for the Sixth Circuit stated that it was "particulary reluctant to disturb that judgment [of the district court] in the absence of a clear showing of abuse." The court of appeals found no such abuse of discretion in the limited record below and indicated its reticence to order relief which, if granted, would interfere with the operation of a municipal ordinance "with the attendant issues of comity and federalism at stake."

Similarly the issuance of a writ of certiorari would not be appropriate in this case because as in many others in which review of an interlocutory order is concerned the exhaustion of the appellate procedure from the temporary determination would interfere with the orderly, sequential operations of the judicial process and because the record available upon interlocutory appeal is incomplete.

According to Rule 19 of the Rules of the Supreme Court, a review on writ of certiorari "is not a matter of right and will be granted only when there are special and important reasons therefor." This Court has stated that an even more rigorous standard should be applied when the appeal is taken from an interlocutory order and that it will not grant the writ unless it is necessary "to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." American Construction Co. vs. Jacksonville, Tampa and Key West Ry., 148 U.S. 372, 384 (1893). Petitioners have not met this rigorous standard.

II

THE DISTRICT COURT'S RULING IS COMPLETELY CONSISTENT WITH THIS COURT'S ANALYSIS IN MAHER vs. ROE, 432 U.S. 464 (1977), WHILE FULLY IN ACCORD WITH THE PRINCIPLES OF ROE vs. WADE, 410 U.S. 113 (1973), SENDAK vs. ARNOLD, 429 U.S. 968 (1976) (PER CURIAM) AND MOORE vs. CITY OF EAST CLEVELAND, OHIO, 431 U.S. 494 (1977).

Respondents recognize that a woman's freedom to arrive at the abortion decision is a fundamental constitutional right, Roe vs. Wade, supra; Doe vs. Bolton, 410 U.S. 179 (1973), and that the City of Cleveland cannot enact an ordinance which effects an absolute bar or an undue interference with the abortion decision, unless there is a compelling state interest. However, Respondents also claim that the challenged ordinance does not constitute any interference

with the abortion decision, and that therefore the compelling state interest test is not applicable.

In Maher, this Court, in effect, set forth a continuum upon which all abortion-relevant regulations should be analyzed. It explicitly stated that only those regulations which constitute a complete or substantial interference with the abortion decision are to be judged by the stringent compelling state interest test rather than the rational basis test. [3]

Section 231.09 does not interfere with the abortion decision. There are existing abortion facilities licensed to operate within the City of Cleveland[4] and the ordinance does not prevent the opening of additional facilities. The facilities which now operate or which may operate in Cleveland may be located in hospitals or may be independent, free-standing clinics. The ordinance merely forbids such facilities in one type of narrowly-defined neighborhood: a limited commercial area adjacent to or surrounded by residences on at least three sides.

---

[3] A chart which graphically illustrates the court's analysis in Maher was utilized for discussion purposes at the preliminary injunction hearing. This illustration was attached to Brief of Defendants-Appellees in the court of appeals and it is attached hereto as Respondents' Exhibit "A".

[4] Petitioners have stipulated to the fact that there are licensed abortion services within the City of Cleveland. Affidavit of Joyce E. Redon, appended to the City's Brief in Opposition to Plaintiff's Motion for Preliminary Injunction as Exhibit "B".

The challenged ordinance is different from the regulations struck down in Moore, Roe, and Sendak. In Moore vs. City of East Cleveland, supra, a city ordinance which prevented certain family members from living together in a single household was declared invalid because it intruded into the fundamental "freedom of personal choice in matters of marriage and family life ..." Moore vs. City of East Cleveland, Ohio, 97 S. Ct. 1932, 1935 (1977). Thus, the East Cleveland ordinance impermissibly interfered with a fundamental right.

Similarly, the abortion regulations contested in Roe vs. Wade, supra, and Sendak vs. Arnold, supra are unlike the Cleveland ordinance because these regulations also immediately, directly, and impermissibly interfered with the protected abortion decision. No regulation could constitute a greater interference with the right to decide on abortion than the statute at issue in Roe which criminalized the performance of an abortion.

This Court's affirmance in Sendak vs. Arnold, supra, of the lower court's decision declaring an Indiana statute unconstitutional is also consistent with the Maher analysis. The Indiana statute was infirm because it required first trimester abortions to be performed in a hospital or in a facility offering the same basic safeguards as a hospital. These requirements were so elaborate that, as a practical matter, they prevented the performance of first trimester abortions in non-hospital settings. The statute created a blanket prohibition on one of two types of facilities (hospital or independent clinic) in which the abortion decision could be effectuated.

Moore, Roe, and Sendak all involved enactments which impermissibly interfered with the exercise of a fundamental right. Section 231.09 does not result in such an undue interference. On the contrary, logic dictates that if ever there were a regulation which does not have an impermissible impact on the abortion decision, Section 231.09 is the regulation. The ordinance does not intrude upon the personal deliberations of the pregnant woman, nor does it affect the type of facility in which a woman may obtain an abortion. The ordinance simply requires that the abortion service not be located in a modest commercial district which is surrounded on three sides by residential neighborhoods.[5] Thus, Section 231.09 should be judged, as are other legislation enactments, by the rational basis test. It is a proper exercise of the police power by the City.

---

[5] A fuller record will reveal that this ordinance is not a subterfuge for prohibiting abortion services in the City or in a substantial area of the City or on the West Side of town. Respondents intend, at trial, to establish for the record the limited area of the City which is designated "local retail business district."

CONCLUSION

For the reasons stated above, Respondents urge that the Petition for a writ of certiorari be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

NO. 78-477

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AND
RICHARD J. DERMAN, M.D., INC.
Petitioners,

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Respondents

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
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APPENDIX

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CERTIFICATE OF SERVICE

Pursuant to Rule 33(3)(b), Rules of the Supreme Court, I hereby certify that three copies of Respondent's Brief in Opposition were served upon the following counsel of record, by depositing same in the United States mail, postage prepaid on this _____ day of _____, 1978:

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_____
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ANALYSIS OF REGULATIONS AFFECTING THE FIRST TRIMESTER ABORTION DECISION
BASED UPON THE DEGREE OF INTERFERENCE WITH THE EXERCISE OF THE PROTECTED RIGHT

COMPELLING STATE INTEREST TEST		RATIONAL BASIS TEST	
Continuum of Interference			
Prohibition	Undue Interference	Allowable Interference	No Interference
Texas's criminal prosecution of doctor who performs abortion except to save life (Roe)	Georgia's J.C.A.H. accreditation requirements (Doe)	informed consent by pregnant woman (Danforth)	no medicaid reimbursements for elective abortions (Maher); (Beal)
spousal consent (veto power) (Danforth)		recordkeeping requirements ("may be a resource relevant to decisions involving medical experience and judgment") (Danforth)	
parental consent (veto power) (Danforth)		parental consent in case of possible "mature child"; abstain to allow possible constitutional application by state court (Bellotti)	city hospital's refusal to provide [free] elective abortions (Poelker)

SOURCE: Maher vs. Roe
432 U.S. 464
(1977)

APPENDIX

CLEVELAND ORDINANCE

Supreme Court, U. S.
FILED
NOV 21 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

NO. 77-477

JOE S. HOPPER, WARDEN,
GEORGIA STATE PRISON,
Petitioner,

v.

TYRONE BARNETT,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE
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OCTOBER TERM, 1978

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Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITIONER'S REPLY BRIEF ON QUESTION OF MOOTNESS

Pursuant to the Court's request, Petitioner submits this Reply Brief on the issue of mootness in this case.

STATEMENT OF FACTS

While Respondent's case was pending in the lower federal courts,he was paroled from his sentence for armed robbery imposed in Liberty County, Georgia. Petition, Page 6, note 1; Response to Petition, Page 3, note 2. Subsequently, by order dated September 6, 1978, the Georgia Board of Pardons and Paroles discharged the Respondent from parole, with an effective date of September 1, 1978. Appendix A, Page A4.

During the pendency of Respondent's appeal to the Fifth Circuit, counsel for Petitioner Hopper, the Appellee in the Court of Appeals, had urged that the appeal be dismissed in that Court for mootness. Respondent Barnett opposed that motion on the ground that his status as a parolee precluded dismissal for mootness.[1]

[1] Counsel for Respondent has indicated to counsel for Petitioner Hopper that he now regards the case as moot, because of Respondent's discharge from parole.

ARGUMENT

RESPONDENT'S DISCHARGE FROM PAROLE RENDERS THIS CASE MOOT. CONSIDERATION OF COLLATERAL CONSEQUENCES FLOWING FROM THE CONVICTION DOES NOT PRECLUDE DISMISSAL FOR MOOTNESS IN THIS CASE, BECAUSE RESPONDENT DID NOT CHALLENGE THE UNDERLYING CONVICTION WHICH LED TO HIS CONFINEMENT.

In the typical habeas corpus context, neither release from custody nor discharge from parole will necessarily foreclose consideration of the merits of the case on the ground of mootness. Pennsylvania v. Mimms, 434 U.S. 106, 108 n. 3 (1977); Sibron v. New York, 392 U.S. 40, 53-57 (1968); Carafas v. LaVallee, 391 U.S. 234 (1968); Jones v. Cunningham, 371 U.S. 236 (1963). Respondent Barnett, however, did not challenge his sentence itself, but attacked the unconstitutionality of the imposition of a $2,000.00 fine as a condition of probation, after the fine was not paid and he had begun to serve his sentence. Because of his discharge from parole, Respondent could not at this point receive any benefit from the relief ordered by the Court of Appeals, which declared the sentence unconstitutional and directed that it be reformed in a manner consistent with the opinion. Barnett v. Hopper, 548 F.2d 550, 554 (5th Cir. 1977).

Respondent's case thus differs from those in which the collateral consequences of a sentence already served are sufficient to prevent a determination of mootness. See, e.g., Pennsylvania v. Mimms, supra; Ginsberg v. New York, 390 U.S. 629, 634 n.2 (1968);

Sibron v. New York, supra. Respondent's conviction was not to be set aside as a result of the lower court's decision, and he would thus not be able to remove the collateral legal consequences of the conviction.

Assuming arguendo that Respondent's case was not moot as long as he remained on parole, the subsequent discharge from parole and the restoration of civil and political rights and removal of disabilities resulting from the 1973 sentence renders this case moot. Cf., North Carolina v. Rice, 404 U.S. 244, 248 (1971). Georgia is not among the jurisdictions which distinguish between sentences imposed on probation and those served in confinement, for purposes of legal disabilities. See Huff v. Anderson, 212 Ga. 32(3)(1955).

CONCLUSION

Because Respondent's discharge from parole has rendered this case moot, this Court should vacate the lower court's judgment with appropriate direction. Scarpa v. U. S. Board of Parole, 414 U.S. 809 (1973); United States v. Munsingwear, Inc., 340 U. S. 36 (1950).

Respectfully submitted,

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APPENDIX "A"

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Member

Mrs. Mamie B. Reese
Member

Floyd Bushee
Member

Mobley Howell
Member

I, Donnie A Lee, Executive Officer for the State Board of Pardons and Paroles, do hereby certify that the attached and foregoing are true and correct copies of:

Parole Certificate effective September 24, 1976

Order of Discharge from Parole and Restoration of Civil and Political Rights effective September 1, 1978

for Tyrone F. Barnett D-14793, as appear of file and record in the offices of the State Board of Pardons and Paroles.

Donnie A. Lee
Executive Officer

Sworn to and subscribed before
me this 14th day of November, 1978.

Paula S. Powell
Notary Public
My Commission Expires September 29, 1979

State Board of Pardons and Paroles

ATLANTA, GEORGIA

Parole Certificate

KNOW ALL MEN BY THESE PRESENTS:

It having been made to appear to the Georgia State Board of Pardons and Paroles that

BARNETT, TYRONE F., Serial No. D-14793,

convicted of the following offense(s) in the court(s) indicated:

ARMED ROBBERY — LIBERTY COUNTY SUPERIOR COURT

is eligible to be PAROLED, and that there is a reasonable probability that said prisoner WILL REMAIN AT LIBERTY WITHOUT VIOLATING THE LAWS, and it being the opinion of the said State Board of Pardons and Paroles that the release of this prisoner is not incompatible with the welfare of society, and it appearing further that the Board is satisfied this prisoner will be suitably employed in self-sustaining employment or will not become a public charge on release:

It is therefore ORDERED that said prisoner be paroled effective ~~20th~~ day of ~~September~~, 19 ~~76~~ pending good behavior under supervision subject to the specific conditions of parole as listed on the reverse side of this Order, until the expiration of his maximum sentence, minus good time earned.

This parole shall not prevent the delivery of the prisoner to authorities of the Federal Government or any State otherwise entitled to his custody.

In witness whereof this Certificate bearing the Seal of the State Board of Pardons and Paroles is issued the ~~10th~~ day of ~~September~~, 19 ~~76~~.

STATE BOARD OF PARDONS AND PAROLES
CECIL C. McCALL, CHAIRMAN
J. O. PARTAIN, JR., MEMBER
MRS. MAMIE B. REESE, MEMBER
JAMES T. MORRIS, MEMBER
FLOYD BUSBEE, MEMBER

FOR THE BOARD:

B. Young

B. YOUNG

Order No. 36,173

STATEMENT OF THE CONDITIONS AND AGREEMENT GOVERNING PAROLE

The Certificate of Parole will not become operative until the following conditions are accepted by the parolee. Violation of any of these conditions may result in immediate revocation of parole.

1. I will report immediately upon arrival at my destination to my Parole Supervisor, either by mail, telephone or personal visit, furnishing to him the Notice of Arrival form.

Your Parole Supervisor's name and address:

Mr. Marvin Tisdale, Parole Officer
Adult Parole Supervision, Potomac Building North
614 H Street, N.W., Washington, D.C. 20001

2. I will, between the first and fifth days of each month, mail my Supervisor a truthful written report on the form provided for that purpose.

3. I will not change my residence or employment or leave the state without first getting permission from my Parole Supervisor. I also understand that should I fail to keep my Parole Supervisor informed as to my residence and employment my parole may be revoked and a warrant issued for my arrest.

4. I hereby waive all extradition rights and process and agree to return to Georgia from any State in the United States, its territories or the District of Columbia.

5. I will not use narcotic drugs in any form unless prescribed by a physician and I will not use intoxicating beverages to excess. I will not visit places of bad reputation where disorderly conduct may occur or which are frequented by persons of ill-repute.

6. I will avoid injurious habits and I will not associate with persons of bad reputation or character.

7. I will not own, use, possess, sell or have under my control any type of deadly weapons or firearm.

8. I will not purchase or have interest in any type motor vehicle without first getting permission from my Parole Supervisor and I will not operate a motor vehicle without having a valid operator's permit.

9. I will not let my debts exceed $300.00 at any time, except where necessary for food and shelter, without first getting permission from my Parole Supervisor.

10. I will not be away from my residence of record between the hours of 12:00 midnight and 6:00 A.M. unless required to do so in connection with my employment.

11. I will conduct myself honorably in all respects, work diligently at a lawful occupation and support my dependents, if any, to the best of my ability.

12. I will not violate any law.

13. I will promptly and truthfully answer all inquiries of the State Board of Pardons and Paroles and its duly authorized representatives and carry out all instructions from them.

14. If it becomes necessary to communicate with my Parole Supervisor and he is not available, I will direct my communication to the Board's headquarters office at 800 Peachtree Street, 6th Floor, Atlanta, Georgia.

Parole Plan: Residence: Mother: Mrs. Sallie N. Barnett, 131 57th Place, S. E., Washington, D. C.

Employment: Family will assist.

SPECIAL CONDITIONS:

I hereby certify that this Statement of Conditions has been read and explained to the Parolee and he has agreed to them.

This 27 day of Sept, 19 76

Tyrone F. Barnett
Parolee's Signature

Warden's Signature

(Give Full address where you can be reached)

A4

State Board of Pardons and Paroles

P. 946

ORDER OF DISCHARGE FROM PAROLE CONDITIONAL RELEASE
And
RESTORATION OF CIVIL AND POLITICAL RIGHTS

Whereas, TYRONE F. BARNETT whose Serial No. is

[illegible]-14793, who, having committed the following offense(s)

OFFENSE	COURT OF CONVICTION	DATE OF SENTENCE	SENTENCE
ARMED ROBBERY	LIBERTY	5/4/73	10 yrs. (comp. from
			4/19/73)

and having been paroled/conditionally released on SEPTEMBER 24, 1976, and having completed his (her) sentence(s) under the jurisdiction of the State Board of Pardons and Paroles or having successfully completed one year on conditional release; now, it is ORDERED that said parolee/conditional releasee be discharged from parole/conditional release on the sentence(s) listed above, the 1st day of SEPTEMBER, 19 78.

THEREFORE, in compliance with the constitutional and statutory authority vested in this Board to remove disabilities imposed by law, it is hereby

ORDERED that time remaining to be served on the sentence(s) described above, if any, be commuted to present service on the above discharge date, and it is

ORDERED that all disabilities resulting from the above stated sentence(s) be removed on the above discharge date, and

ORDERED FURTHER that all civil and political rights lost as a result of the offense(s) be restored on the above discharge date.

It is directed that copies of this order be furnished to the said individual and to the Clerk(s) of the Superior Court(s) in the County(s) where the above sentence(s) were imposed.

GIVEN UNDER THE HAND AND SEAL of the State Board of Pardons and Paroles this 6th day of SEPTEMBER, 19 78

*The above order discharges from parole/conditional release only; it does not relieve from any time to be served on probation on the above or pending probation sentences. If the parolee/conditional releasee has any time remaining to be served on probation, he (she) must report at once to the proper probation agency.

STATE BOARD OF PARDONS AND PAROLES

Clemency Action Recorded
2/4/80 [illegible]

James T. Morris, Chairman
J. O. Partain, Jr., Member
Mrs. Mamie B. Reese, Member
Floyd Busbee, Member
Mobley Howell, Member

Parole Order No 36,173

cc: State Board of Corrections
Parole Supervisor DISTRICT OF COLUMBIA

CERTIFICATE OF SERVICE

I, G. Stephen Parker, Attorney of Record for the Petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that in accordance with the Rules of the Supreme Court of the United States, I served three copies of the foregoing Reply Brief on the Question of Mootness upon the Respondent by depositing same in a United States mailbox, with first class postage prepaid, addressed to counsel of record as follows:

Mr. James C. Bonner, Jr., Esq.
University of Georgia
School of Law
409 North Lumpkin Street
Athens, Georgia 30601

This 21st day of November, 1978.

G. Stephen Parker

G. STEPHEN PARKER